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## CONDITIONAL DELIVERIES OF DEEDS OF LAND.

NORMALLY the final act of the grantor in the making of a deed of land is its delivery to the grantee. It is not necessary for the purposes of this article to enter into any exhaustive analysis of the essentials of a good delivery; to consider whether delivery is purely a question of the grantor's intent or whether that intent must be evidenced by some external physical act, or the further question whether in addition to this intent there must be a physical tradition or other dealing with the instrument. Assuming a sufficient external manifestation of intent and a sufficient physical delivery of the instrument, the question whether this otherwise complete instrument becomes operative as a deed may be said to be a question of the grantor's intent. If he intends that this otherwise complete instrument shall now become operative as his deed, it does now so become; if he does not so intend, then, in the absence of facts that will raise an estoppel against the grantor it will not be treated as his deed. Consequently if A. signs and seals a conveyance of land in favor of B., but keeps it in his desk with nothing more than the idea that he may at some future date deliver it, there is clearly no deed. The situation is unchanged if he puts it in the hands of a third person to keep for him. On the other hand, if A. takes this otherwise complete instrument executed in favor of B. and hands it over as his deed to B., who accepts it as such, it needs no citations to establish that the title to the land thereupon

passes from A. to B. The same consequence follows if A., intending thereby to make the instrument operative as his deed, delivers it as such to X. as the agent of B., and this is equally true whether X. is the duly authorized agent of B. or whether he is in fact a stranger to B., provided that the latter subsequently ratifies his act. Whether in general a separate act of acceptance by B. is necessary to make the instrument operate as a deed need not be discussed.

For the purposes of this article the important feature in the illustrations given is the fact that, whether the transaction is immediate between A. and B., or whether a third person X. is involved, the transfer of title is (save for the question of acceptance above alluded to) instantaneous. If X. is merely A.'s agent and A. has not yet manifested his intent that the instrument should operate as his deed, it is a nullity, and B., whatever his equitable rights may be, has no legal interest in the property. If X. is acting as B.'s agent, authorized or unauthorized, and A. has made a delivery to him as such, the title is wholly in B. and A. has no legal interest in the property save as it may be reserved to him upon the face of the instrument.

Between these two extremes lies a group of cases where, without making any attempt to state the situation with technical exactness, it may be said that the transfer from A. to B. of the title, using this term to denote the sum total of the real rights that are the subject matter of the deed, is not instantaneous. This situation arises when the third person X., to whom the deed is handed over, is the agent of both A. and B.; where the deed has passed out of the control of A. but where its coming into the complete control of B. is dependent upon a contingency of some kind. This is the class of case that is loosely referred to as an escrow, or conditional delivery.

Looking at the cases somewhat more carefully, it will be seen that there are three fundamentally different situations which are embraced within the more general phrases above-mentioned. (1) B. may have a contractual right against A. with respect to the land, and the conveyance may be executed by A. and left with X. to be by him delivered to B. upon the performance by the latter of his part of the contract. This is the situation to which the term "escrow" is most fittingly and commonly applied. (2) A. may execute a conveyance in favor of B. and give it to X. to be by him

delivered to B. upon A.'s death. (3) A. may execute a conveyance in favor of B. and give it to X. to be by him delivered to B. upon the happening of some contingency other than those above mentioned. Each of these groups will be separately considered.

# I.

Suppose that A. and B. make a contract to sell and buy respectively a piece of land, and that A. further agrees to and does in fact execute in proper form and give to X. a deed of the land. X., it is agreed, is to hold it until B. performs his part of the contract and is then to deliver it to B. B. performs his part of the contract, which we may assume to be the payment of the purchase price, and X. delivers to him the deed. B. gets a good title. When did the instrument become A.'s deed so as to pass the legal title to B.? Obviously not when A. handed it over to X., for he did not intend that it should at that time become his deed. His intent was, and it was sufficiently externally manifested by the terms under which he delivered the instrument to X., that it should become his deed when the consideration was paid by B. There seems to be no difference of opinion on the proposition that both *inter partes* and as regards third persons who stand in no peculiar relations to either A. or B. the escrow becomes a deed and the title passes at the second delivery.<sup>1</sup> Thus when at the time of the first delivery there was an outstanding interest in the land which is bought in by the grantor before the second delivery there is no breach of the covenants of title;<sup>2</sup> so as to an incumbrance removed between the two deliveries by the grantee, the fact that it was in existence when A. delivered to X. is no breach of the covenant against incumbrances;<sup>3</sup> so the fact that A. has delivered the escrow to X. for B. cannot be set up by A.'s tenant in bar of a distraint for rent by A.<sup>4</sup>

Suppose, however, that after the delivery from A. to X. but before B. performs, A. directs X. not to deliver the instrument to B. on B.'s performance. What are now B.'s rights? It has been held

<sup>1</sup> Hull v. Sangamon River Drainage District, 219 Ill. 454, 76 N. E. 701 (1906); Andrews v. Farnham, 29 Minn. 246, 13 N. W. 161 (1882). See County of Calhoun v. American Emigrant Co., 93 U. S. 124 (1876).

<sup>2</sup> Furness v. Williams, 11 Ill. 229 (1849).

<sup>3</sup> Hoyt v. McLagan, 87 Ia. 746, 55 N. W. 18 (1893).

<sup>4</sup> Oliver v. Mowat, 34 U. C. Q. B. 472 (1874).

that he may if he wishes, after performance or tender, ignore the delivery in escrow, and go into equity and compel A. to execute a new deed.<sup>5</sup> He need not, however, so do. If X., after performance by B., delivers the deed to B. despite A.'s order to the contrary, it is well settled that this will be sufficient to vest the legal title in B.<sup>6</sup> If X. does not deliver the deed after performance by B., the title is nevertheless held to pass,<sup>7</sup> and B. may maintain a bill in equity against X. to compel him to deliver the deed,<sup>8</sup> or if the deed has wrongfully been delivered by X. to a third person, B. may maintain trover for it against such third person.<sup>9</sup> There is no hardship on A. in this rule and it is an easy way of accomplishing justice, but for an understanding of other aspects of the law of escrow it is well to see exactly what is done in this case. As has been already pointed out, the general rule is clear that the delivery of a deed is fundamentally a question of the grantor's intent. If he executes and delivers the deed in pursuance of a decree of a court of equity his intent is immaterial, because the only court to which he could go to get relief against this deed is the one that has ordered him to make it. But in the present case the instrument has been voluntarily executed, and although he may be guilty of a breach of contract in not consenting, at the time when the grantee performs, that it shall become operative as his deed, the fact still remains that he does not so consent. Upon what principle then can the court nevertheless declare it to be effective as his deed? Let us for a moment consider a different kind of case.

Suppose, independently of any question of escrow, that A. contracts with B. to sell and B. to buy a piece of land. B. pays or tenders the price; A. refuses to convey. B. can go into equity and obtain a decree compelling A. to execute a deed in due form. As has just been mentioned, the fact that A. at the moment when he was delivering the deed in pursuance of the decree was in a state of internal rebellion and in fact did not intend the instrument as his

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<sup>5</sup> *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958 (1900).

<sup>6</sup> *Wymark's Case*, 5 Coke 74 a (1594); *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301 (1898); *Hughes v. Thistlewood*, 40 Kan. 232, 16 Pac. 629 (1888); *Regan v. Howe*, 121 Mass. 424 (1877); *Farley v. Palmer*, 20 Oh. St. 223 (1870).

<sup>7</sup> See cases cited in preceding note.

<sup>8</sup> *Tombler v. Sumpter*, 97 Ark. 480, 134 S. W. 967 (1911); *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172 (1905); *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. 781 (1887).

<sup>9</sup> *Hooper v. Ramsbottom*, 6 Taunt. 12 (1815).

deed would make no difference. It would have all the earmarks of a deed, and B.'s title acquired under the deed would be unimpeachable.<sup>10</sup> Now consider the situation when there is in fact this escrow which A. has agreed shall become his deed upon the payment by B. of the purchase price. B. has paid, but A. has refused his consent that it shall become his deed. Here already at hand is a document which bears all the earmarks of A.'s deed; B.'s equitable right is clear to compel performance by A. of his part of the contract, but such a deed when executed by A. will, so far as outward appearance goes, be no more A.'s deed than the one now in existence. Under such a state of facts it is not to be wondered at that a court should simply make a short cut, ignore the non-existence of A.'s intent and declare the present document to be binding at law as his deed. The court may say that A.'s intent in this kind of case is immaterial, or it may put the doctrine in the form of a fiction and say that his intent is "irrevocably given" or is "conclusively presumed to continue." The important fact is, that in a case where there would be relief in equity the courts have seized on the existence of the escrow to work out the same relief under a legal formula.<sup>11</sup>

When the rights of third persons are involved, the fictional character of the doctrine of delivery in escrow and the fact that it is essentially a working out of equitable rights under legal formulæ are more clearly perceptible. Thus, suppose that after A. and B. have contracted as before, A., after depositing the escrow with X. but before B. performs, dies, leaving an heir, C. Now not only is it clear that when B. performs A. cannot intend the instrument to operate as his deed, but there is the further difficulty that at that time the legal title to the land is not in A. but in C. Plainly B. could go into equity here and get a conveyance from C. since the

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<sup>10</sup> Compare "Specialty Contracts and Equitable Defences," by James Barr Ames, 9 HARV. L. REV. 49, at 57, 58.

<sup>11</sup> In *Jackson v. Catlin*, 2 Johns. Cas. (N. Y.) 248 (1807), Chancellor Kent discussed at some length the character of the right of a grantee in an escrow and came to the conclusion that it was in the nature of a condition, personal to the grantee, and did not pass to the state under an act of attainder that forfeited "all his estate, both real and personal, held or claimed by him, whether in possession, reversion, or remainder, and also all estates and interests claimed by executory devise or contingent remainder." It is worth noting that the statute does not in terms include equitable interests.

latter is not a *bonâ fide* purchaser. Can the court of law use the instrument previously executed and still in X.'s possession to accomplish the same result? Surely. All that is necessary is for the court to say that on the performance by B. and the delivery by X. the deed of A. "relates" to the time of the original delivery by A. to X. Thus B. is saved the need of a recourse to equity. Such a statement, of course, is another fiction — the language used really explains nothing. If, however, the suggestion already made be borne in mind and if the law as laid down be regarded as being, as in the situation previously considered, a working out in legal forms of equitable rights, the case becomes readily understandable. There are a number of decisions that hold under just these facts that as a matter of law A.'s deed operates to convey to B. a title that is good as against A.'s heir, A. having died after the delivery to X. but before the performance by B.<sup>12</sup>

This fiction of relation is a hard tool to handle: under what circumstances will the second delivery relate to the first so as to cut out intervening rights? It must be admitted that the rules ordinarily laid down are of no great assistance in a specific case, whether we take the statement of Sheppard's Touchstone<sup>13</sup> "that to some purposes it hath relation to the time of the first delivery and to some purposes not," or the language that the courts at present not infrequently use, that the deed will relate where it is necessary "to accomplish justice." If the principle that has already been suggested, namely, that the courts in their determination of the rights created under a delivery in escrow have been unconsciously working out in legal form by means of fictions what are essentially equitable rights, is capable of general application it ought not to be difficult to arrive at a perfectly specific answer to the question as to when the legal title derived under an escrow relates to the first delivery. If C., the person whose rights intervene between the first and the second delivery, is a purchaser for value from A. without notice of B.'s rights, then there will be no relation; the second delivery will

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<sup>12</sup> *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563 (1897); *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172 (1905); *Cook's Adm'r v. Hendricks*, 4 T. B. Mon. (Ky.) 500 (1827); *Webster v. Trust Co.*, 145 N. Y. 275, 39 N. E. 964 (1895); *Van Tassel v. Burger*, 119 N. Y. App. Div. 509, 104 N. Y. Supp. 273 (1907). The language of the court in *Teneick v. Flagg*, 29 N. J. L. 25 (1860) is *contra*, although the case is distinguishable on the facts.

<sup>13</sup> P. 59.

be too late to affect C.'s previously acquired title and B. will lose. If C. is not a *bonâ fide* purchaser we may expect that the court, instead of saying that C. has the legal title but subject to an equity in favor of B. which B. may protect in a court of chancery, will say that the escrow deed relates to the first delivery and so gives B. the older legal title and that C. gets no legal title at all. An examination of the cases in which the question has been raised will show that so far as the actual decisions go there is almost complete unanimity in the results reached. The following are the more important characteristic cases that raise this question.

A. and B. make a contract for the sale of land and A. delivers his escrow to X. for B. A. then marries C. B. then performs and the deed is delivered. It will relate to the first delivery so that C., the wife, will have no dower interest in the land, and the deed will not be open to the objection that it does not pass a clear title.<sup>14</sup>

Again, where A., after the delivery of the deed in escrow to X., sells the same land to C., who gives therefor a valuable consideration but knows of the deed delivered in escrow to X., B., the grantee in the escrow deed, will, on performing the conditions of the escrow and getting the deed, obtain thereby a title that is at law superior to that which C. obtained from A.<sup>15</sup>

An attaching creditor is not, in most jurisdictions, treated as a purchaser for value; consequently as against him also the title of B., the grantee, will "relate" to the first delivery and defeat the attachment.<sup>16</sup>

<sup>14</sup> *Vorheis v. Kitch*, 8 Phila. (Pa.) 554 (1871).

<sup>15</sup> *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23 (1889); *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467 (1902), *semble*; *Lewis v. Prather*, 14 Ky. L. Rep. 749, 21 S. W. 538 (1893). Three California cases are worth noting in regard to the nature of the right that the grantee in the escrow deed obtains as against a purchaser for value with notice who gets his title between the first and second escrow deliveries. In *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315 (1887), the court held that the legal title went to C., the *malâ fide* purchaser, but that B., the grantee in the escrow deed, was entitled to a conveyance of the title. In *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580 (1887), on the same state of facts, where the action was for the possession of the land, the court held that B. was entitled to possession as against C. In *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499 (1888), on the same state of facts the court again held that B. was entitled to possession against C., and further said that as against B., C. "gets no title." See also *Wittenbrock v. Cass*, 110 Cal. 1 (1895).

<sup>16</sup> *Dettmer v. Behrens*, 106 Ia. 585, 76 N. W. 853 (1898); *Whitfield v. Harris*, 48 Miss. 710 (1870); *Hall v. Harris*, 5 Ired. Eq. (N. C.) 303 (1848). *Walcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675 (1896), is sometimes cited as *contra*. In that case A., the vendor, was endeavoring to compel B. to accept a title against which there ex-

Price v. Pittsburg R. Co.<sup>17</sup> presents a different illustration of the same tendency. In that case the land covered by the escrow was occupied by tenants. The vendees paid interest on the purchase price from the date of the delivery to X., the holder of the escrow. After performance and delivery of the deed the title was held to relate to the first delivery, and the vendees were allowed to maintain against the tenants an action of assumpsit for use and occupation from the date of the first delivery of the escrow.

Over against these cases is to be set the case where C. occupies the position of a *bonâ fide* purchaser. Thus under the recording law of Oregon an attaching creditor is treated as a purchaser for value.<sup>18</sup> A. and B. had made a contract for the sale of the land and A. had deposited the deed in escrow with X. B. had made part payment. C., a creditor of A., then attached. It was held that any further payments to X. for A. made by B. after notice of C.'s attachment were ineffectual as against C., who by his attachment obtained all the interest that A. still retained in the premises, namely, the bare legal title and an equitable right to hold that title for the unpaid balance of the purchase price.<sup>19</sup>

Thus far in the cases that have been examined B.'s equity has been the older, and the question has been whether the later transaction with C. did or did not cut it off or, to put it correspondingly in the formula that is usually employed, whether B.'s deed did not or did relate. This application of the doctrine of relation in escrow in exact analogy to the principles of equity appears, however, in other ways. Thus in one case A. derived title from C. under a voidable tax deed duly recorded. A. had brought an action to quiet title against C. and judgment had been rendered in A.'s favor. A. later contracted to sell and B. to buy the land, and A. executed a deed and deposited it in escrow with X. for B. C. then filed a motion to reopen the proceedings in the action to quiet title and to set aside

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isted C.'s attachment lien, acquired with notice of the relation between A. and B. The court held that B. could not be compelled to accept a doubtful title. In *Jackson v. Rowland*, 6 Wend. (N. Y.) 666 (1831), the attaching creditor prevailed over the grantee in escrow. It is not clear in that case, however, that at the time of C.'s attachment there was any definite contract with respect to the sale of the land.

<sup>17</sup> 34 Ill. 13 (1864).

<sup>18</sup> Oregon, Hill's Ann. Laws, sec. 150.

<sup>19</sup> *May v. Emerson*, 52 Or. 262, 96 Pac. 454, 1065 (1908).

the judgment in A.'s favor. B. paid the purchase price and received the deed, and was then made a party to the proceedings. It was held that B. had constructive notice by the filing of C.'s motion, and that consequently as against C. his deed would not relate, if the title should ultimately be found to be in C.<sup>20</sup> This case is a very pretty illustration in legal language of the equitable principle that the owner of the junior equity who gets his equity in good faith and who then starts to get in the legal title will take the legal title subject to the older equity provided he has notice of the older equity before paying the purchase price.<sup>21</sup>

An unconscious application of another principle of equity to the doctrine of relation is seen in *Frost v. Beekman*.<sup>22</sup> A., in pursuance of a contract with B., delivered to X. a conveyance of the land to be delivered to B. when he should give X. a duly executed mortgage of the land in favor of A. B. made a deed of the land to C. B. then executed the mortgage to A., had it recorded, delivered it to X. and received from X. the conveyance executed by A. Both A. and C. acted without actual notice. It was held that as between A. and C. the conveyance from A. to B. would not relate, because so to hold would make the mortgage to A. subsequent to the conveyance to C.; and as the escrow is allowed to relate only "to do justice" it would not be allowed so to do in this case; with the consequence that C. took subject to A.'s mortgage. The court added that as between A. and B. the escrow would relate. Had there been no conveyance in escrow here but merely an agreement to convey, and had B. then deeded to C., then mortgaged to A. and contemporaneously taken a deed from A., it seems clear that a court of equity in settling the rights of the parties would have reached the same result that was reached here in legal form.<sup>23</sup>

Another illustration of the underlying principles of the doctrine of relation is the following case. A. contracted with B. and C. for the sale of land, and in pursuance of the contract left with X. his escrow executed in favor of B. and C. B. died before the performance of the contract. It was held that upon the performance

<sup>20</sup> *Baker v. Snavelly*, 84 Kan. 179, 114 Pac. 370 (1911).

<sup>21</sup> Ames, *Cases on Trusts*, 2 ed., 287.

<sup>22</sup> 1 Johns. Ch. (N. Y.) 288 (1814), reversed on other grounds, 18 Johns. (N. Y.) 544 (1820).

<sup>23</sup> Cf. *Eyre v. Burmester*, 10 H. of L. 90 (1862); Ames, *Cases on Trusts*, 2 ed., 306.

of the contract by C. and the delivery of the deed by X. B.'s heir and C. took the legal title as tenants in common.<sup>24</sup>

As previously pointed out the regular rule is, soundly enough, that *inter partes* the title in an escrow deed passes at the second delivery. Where, however, even *inter partes* the analogy to doctrines of equity would require the court to hold that the deed relates, it has not hesitated so to do. Take, for example, the rule of equity that where the vendee pays interest on the purchase price from the time of the making of the contract up to performance, he is entitled to the rents and profits of the land in the absence of an express contract giving them to the vendor.<sup>25</sup> A. and B. made a contract for the conveyance of a tract, the deed was deposited in escrow with X., A. collected the rents until the second delivery by X. to B., the latter having also paid interest on the purchase price. It was held that on the delivery of the deed the title related to the first delivery and B. was allowed to maintain an action against A. for breach of the covenant of warranty.<sup>26</sup>

Before leaving this branch of the subject, there is one slightly different class of case that should be noticed. Thus far we have dealt with cases where the agreement between A. and B. consisted of a mutually enforceable contract, in pursuance of which the deed was delivered in escrow. Is there any difference in the application of the doctrine of relation if A. gives B. a binding option on the land? So far as the rights of the parties in a court of equity are concerned, it has been said in England<sup>27</sup> that B. will be unable to enforce this option as against a purchaser from A. of the legal title, this case being regarded as coming within the principle laid down in *Haywood v. Brunswick Building Society*<sup>28</sup> that a court of equity will not enforce an affirmative obligation relating to the land against another than the original contractor. In this country, however, there are several decisions and *dicta* to the effect that such an option is enforceable against a person who takes under A. with notice or without paying consideration.<sup>29</sup> In the working out of these same

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<sup>24</sup> *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26 (1887).

<sup>25</sup> 29 Am. and Eng. Encyc. of Law, 2 ed., 708.

<sup>26</sup> *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117 (1906). Compare *ante*, p. 567.

<sup>27</sup> *London & Southwestern Ry. v. Gomm*, 20 Ch. D. 562, 583 (1882).

<sup>28</sup> 8 Q. B. D. 403 (1881).

<sup>29</sup> *Ross v. Parks*, 93 Ala. 153, 8 So. 368 (1890); *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723 (1898); *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46 (1890); *Cummins*

equitable principles in the escrow cases no distinction is made between the mutually enforceable contract and the option. In fact it is frequently difficult to discover whether the agreement between the parties, in pursuance of which the delivery in escrow was made, was a mutual contract or an option. There are, however, a few cases where it seems clear that there was only an option. Thus where in pursuance of an option contract A. deposited in escrow with X. a deed in favor of B. and died devising the land to C., B. on a subsequent compliance with the terms of the option was held to have obtained by A.'s deed a legal title good "by relation" against the devisee;<sup>30</sup> in another similar case such a deed was held binding against A.'s heir,<sup>31</sup> and in another against a purchaser with notice.<sup>32</sup>

It seems clear then that in these cases of escrows the courts have, with one or two possible exceptions, uniformly in varying sets of circumstances worked out what they have treated as the legal rights of the parties in precisely the same way that a court of chancery would have worked them out as equitable rights.

## II.

In the class of cases just considered, the two salient facts have been these: first, that A., the grantor, did not intend by the execution and delivery of the deed to the holder in escrow thereby to pass to B., the grantee, any interest in the land; whether the deed should ever become operative remained an uncertainty depending upon whether or not B. performed his part of the contract: second, that B. had throughout an equitable interest in the land. The class of case now to be considered differs in both regards from the preceding group. Suppose that A. executes in favor of B. a deed of Blackacre and gives it to X. and says, "This is for B., give it to him at my death." What rights arise out of this transaction?

At the outset a rather difficult question of fact sometimes presents itself. Does A. mean to keep control over his deed so that

*v. Beavers*, 103 Va. 230, 48 S. E. 891 (1904); *Marthinson v. King*, 150 Fed. 48 (1906).

<sup>30</sup> *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729 (1890).

<sup>31</sup> *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958 (1900).

<sup>32</sup> *Baum's Appeal*, 113 Pa. St. 58, 4 Atl. 461 (1886). See also *Whitmer v. Schenk*, 11 Idaho 702, 83 Pac. 775 (1906).

he still has the right to take it back, with the result that the situation really is that X. is to deliver the deed to B. only if A. does not tell him to do something else with it, *i. e.*, is X. really holding it simply as A.'s depository; or has A. definitely parted with all control over it, does he regard the transaction as finished so that the matter of B.'s getting the land is only a question of time?<sup>33</sup> If the former view be taken of the facts the whole question falls. The decided preponderance, both of decisions and *dicta*, is that unless A. relinquishes all control over the instrument at the time of the delivery to X. it differs in no wise from a will, because not until the moment of A.'s death can it be regarded as definitely intended to be operative; and being in substance a will, it must fail of effect because it does not satisfy the statutory requirements of a will.<sup>34</sup>

Assuming that A. reserves no such control over the deed as to make it substantially a testamentary instrument, and so bad for the reasons just considered, what are the rights that arise from the delivery to X. of the deed for B.? There seem to be two pretty clearly defined theories on which the courts have proceeded, although it must also be pointed out that in some cases the courts seem to have shifted from one view to the other, apparently without any clear appreciation of the fact that they were so changing their position.

In the larger number of states where this question has arisen for adjudication the rule has been laid down that the delivery by A. to X. vests immediately the title to the land in B.<sup>35</sup> In some states

<sup>33</sup> For cases where the decision has turned on this question of fact *cf.* *Jones v. Loveless*, 99 Ind. 317 (1884), with *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (1887); *Hale v. Joslin*, 134 Mass. 310 (1883), with *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797 (1898); and the majority and minority views in *Hathaway v. Payne*, 34 N. Y. 92 (1865).

<sup>34</sup> *Doe v. Bennett*, 8 C. & P. 124 (1837); *Wellborn v. Weaver*, 17 Ga. 267 (1855); *Stinson v. Anderson*, 96 Ill. 373 (1880); *Jones v. Loveless*, *supra*; *Carey v. Dennis*, 13 Md. 1 (1858); *Hale v. Joslin*, *supra*; *Cook v. Brown*, 34 N. H. 460 (1857), overruling *Shed v. Shed*, 3 N. H. 432 (1826); *Prutsman v. Baker*, 30 Wis. 644 (1872). In some few jurisdictions it has been held that the fact that the grantor reserved the power to revoke the deed will not make it bad if in fact he dies without having exercised the right of revocation. *Belden v. Carter*, 4 Day (Conn.) 66 (1809); *Woodward v. Camp*, 22 Conn. 457 (1853) (but see *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337 (1905)); *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285 (1816); *Morse v. Slason*, 13 Vt. 296 (1841).

<sup>35</sup> *Doe v. Bennett*, 8 C. & P. 124 (1837); *Schurz v. Schurz*, 153 Ia. 187, 128 N. W. 944 (1910); *Thatcher v. St. Andrews*, 37 Mich. 264 (1877); *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631 (1907) *semble*; *Brown v. Westerfield*, 47 Neb. 399,

this rule is accompanied by the qualification that B.'s interest is subject to a life estate in favor of A.<sup>36</sup> The rule as thus laid down undoubtedly achieves just the result that the grantor had in mind. By his delivery to X. he intends to settle the matter once for all, and then and there to vest in B. a definite, indestructible, real right. By his direction to the depositary to retain the deed in his own possession until the death of the grantor, he clearly has in mind the creation of a situation such that he shall not be disturbed in the possession of the property during his life. On just what theory the courts proceed in their doctrine that A. has a life estate is not clear. There is ordinarily nothing on the face of the instrument sufficient to create such an estate.<sup>37</sup> The result may perhaps be reached upon the theory of a resulting use which would give A. a legal life estate; or upon the theory of a trust of some sort which would give him an equitable estate, although the relation of such to the Statute of Frauds is nowhere, so far as the writer is aware, discussed in these cases; or, which would seem perfectly sound, the courts may mean simply that since the deed is in the possession of X. and will not be delivered to B. until A.'s death, there is no one who can disturb A. in the possession of the land and that consequently he has what is substantially as good as a life estate; perhaps with the further implication that should B., prior to A.'s death, obtain possession of the deed by fraud or otherwise, a court of equity at least would protect A. in the enjoyment of the premises.

The theory above outlined is simple and, if the statements of the court as to the existence of a life estate in the grantor be taken in the sense last suggested, is not inconsistent with other branches of the law of real property. In a number of jurisdictions, however, the courts have used language which, taken at its face value, would

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66 N. W. 439 (1896); *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 393 (1901), *semble*.

<sup>36</sup> *Bury v. Young*, 98 Cal. 446, 33 Pac. 338 (1893); *Wheelwright v. Wheelwright*, 2 Mass. 447 (1807); *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797 (1898); *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756 (1909). See *infra*, note 39.

<sup>37</sup> In some cases the language of the deed is held to amount to an express reservation of a life estate in the grantor. *West v. Wright*, 115 Ga. 277, 41 S. E. 602 (1902); *Douglas v. West*, 140 Ill. 455, 31 N. E. 403 (1892); *Hunt v. Hunt*, 119 Ky. 39, 82 S. W. 998 (1904); *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. 287 (1893); *Ball v. Foreman*, 37 Oh. St. 132 (1881).

seem to indicate that in the class of case now under consideration they thought the rule to be that the title passes from A. to B. only on the delivery of the deed by X. to B., or perhaps at the moment of A.'s death, with the corollary that when necessary for the purposes of justice the title will relate to the time of the delivery from A. to X.<sup>38</sup> This whole doctrine is undoubtedly derived from the class of true escrows already considered in the first part of this article; indeed the courts sometimes refer to the present situation as being a delivery in escrow. The fundamental differences, however, between the two kinds of cases are obvious. As already pointed out, the reason why in the true escrows A. cannot change his intent after the delivery of the deed to X., or to put it more accurately, why his change of intent is immaterial, and the reason why the deed relates under certain circumstances is that B. throughout has in the land an equitable interest that is being protected in these legal forms. This foundation is here wholly lacking; B. is, *ex hypothesi*, a donee; he has neither paid any consideration nor performed any act that would raise an equity in his favor. On the theory now under consideration that no title passes to B. until A.'s death, it is hard to perceive any reason why A. should not be permitted to change his mind and revoke his deed at any time prior to his death. Not only does B. on this theory not have any real rights, but he has not even a contract right. And if A. may change his mind at any time prior to his death, the document would seem in substance to be a testamentary instrument and bad if it fails to satisfy the requirements necessary to a will. The truth of the matter seems to be either that the courts use this phraseology loosely and without meaning exactly what they say (as will be pointed out in the next paragraph), or else we have here a possible new doctrine in the law of conveyances by deed which will be considered more at length later on.

Admitting that there seems to exist in this branch of the subject this conflict in the doctrines held by the different courts, the more important question is as to how real this apparent conflict is. If we direct our attention not to the language of the courts but to the result that they reach, the differences between these two groups of decisions largely disappear. There is a peculiar justification for

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<sup>38</sup> *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. 427 (1904); *Stephens v. Rinehart*, 72 Pa. St. 434 (1872); *McCalla v. Bane*, 45 Fed. 828 (1891). See *infra*, note 39.

disregarding the exact language of the courts in these cases, because of the fact already alluded to that in some instances in the same jurisdiction the court has at one time apparently based its decision upon the ground that the title passes to the grantee at the moment of delivery by the grantor to the depository, and at another time upon the ground that it passes as of the date of the second delivery, but relates.<sup>39</sup> Looking then only to the facts of these cases it will be seen that in almost nine-tenths of them the contest is between B. the grantee of the deed and the heirs of the grantor. In such a case the only real question is whether B. has the title. How or when he got it is of minor importance. Under such circumstances the statement that the title passes only at the second delivery, or the further statement that when it passes it relates to the first delivery, need not be taken with literal exactness.

Conceding, however, that in most of the cases it is unnecessary to do more than decide that B. has at some time acquired from A. a title that is good against A.'s heir, if the contest arises between the grantee under the deed and some person who claims a right derived from A. between the first and the second delivery the need for an exact delimitation of the rights of the parties then becomes imperative. If the court goes on the theory that B. gets title from the first delivery so that the utmost that A. has after the delivery of the deed to X. is a legal life estate, then any person claiming under A., whether as purchaser, creditor, or donee, would acquire no property right that could be asserted against B. after A.'s death. The possibility of the common-law rights of the person claiming under A. being

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<sup>39</sup> Thus in Connecticut, in *Woodward v. Camp*, 22 Conn. 457 (1853), the court seems to follow the theory that the title passes at the second delivery and relates; in *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337 (1905), it seems to say that the title passes at the first delivery subject to a life estate in the grantor; so in Indiana in *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (1887), and *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090 (1889), on the one hand, and *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515 (1896), on the other, respectively; in Missouri, in *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99 (1892), and *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337 (1911), respectively; so in New York in *Tooley v. Dibble*, 2 Hill (N. Y.) 641 (1842), and *Nottbeck v. Wilks*, 4 Abb. Pr. (N. Y.) 315 (1857), on the one hand, and *Brown v. Austen*, 35 Barb. (N. Y.) 341 (1861), on the other, respectively; in *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52 (1892), and *Stonehill v. Hastings*, 202 N. Y. 115, 94 N. E. 1068 (1911), the court seems to follow the earlier cases; so in Ohio in *Crooks v. Crooks*, 34 Oh. St. 610 (1878), and *Ball v. Foreman*, 37 Oh. St. 132 (1881), respectively. See also the language of the court in *Wheelwright v. Wheelwright*, 2 Mass. 446 (1807).

enlarged by virtue of the recording acts need not at present be considered. In the cases that proceed upon this theory as to the effect of the original delivery the results reached are in accord with this reasoning. In *Brown v. Austen*<sup>40</sup> the contest was between judgment creditors of A. the grantor, their rights accruing after the first delivery and B. the gratuitous grantee, to whom the second delivery had been made after A.'s death. The judgment was for B. The court examined the question carefully and stated that only if the deed took effect from the first delivery would the grantee prevail as against the attaching creditors. In *Wittenbrock v. Cass*<sup>41</sup> B. won as against one who, after the delivery by A. to X. of the deed in B.'s favor and before the delivery of the deed to B. by X., purchased the same lands from A. with knowledge of the deed to B. The court based its decision on the earlier case of *Bury v. Young*,<sup>42</sup> in which case B. won as against a devisee of A. The two cases are, however, distinguishable in that in the later case B. paid a consideration.<sup>43</sup>

If now we take the theory that a title passes to B. only by the second delivery, it must be clear that except in so far as B. is protected by the doctrine of relation he will lose as against anyone who in the interval between the first and the second delivery acquires from A. any interest, legal or equitable, in the same piece of land. If the interest acquired by the third person is legal, B. will clearly lose as having the later legal title. If the interest acquired by the third person is equitable, B. will also lose, for although in that case he would acquire the legal title he would get it as a donee, hence subject to previous equities. How far then in this group of cases is B. helped out by the doctrine of relation?

In *Rathmell v. Shirey*<sup>44</sup> the contest was between creditors of the deceased grantor and B. the gratuitous grantee. The grantor had remained in possession of the land, the creditors had no notice,

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<sup>40</sup> *Supra*, p. 579.

<sup>41</sup> 110 Cal. 1, 42 Pac. 300 (1895).

<sup>42</sup> 98 Cal. 446, 33 Pac. 338 (1893).

<sup>43</sup> In *Blair v. St. Louis R. Co.*, 24 Fed. 539 (1885), the court held that B. after the delivery to him by X. of A.'s deed could not defeat a right of way granted in fee by A. to C. between the first and the second delivery. The court, however, based its decision upon the ground that B. was barred by the Statute of Limitations, and also referred to the fact that A. remained in possession and that the deed to B. was not at the time recorded.

<sup>44</sup> 60 Oh. St. 187 (1899), 53 N. E. 1098.

actual or constructive, of the deed to B. and extended credit upon the faith of A.'s apparent ownership. The court, while not finding any fraud, said that the doctrine of relation applied only to do justice, that it would not do justice to apply it here, and gave judgment in favor of the creditors.<sup>45</sup> It should be noticed that in Ohio lien creditors are within the protection of the recording act, and simple creditors of a deceased debtor are by virtue of the lien which arises at his death also brought within the act;<sup>46</sup> in other words, that the creditors here were in the position of purchasers for value without notice. In this case, therefore, even had the court proceeded upon the theory that the title passed to B. at the first delivery, the result would have been the same.

In *Smiley v. Smiley*<sup>47</sup> a wife of A., whom he had married after his delivery to X. of the deed to B., claimed dower in the land so conveyed. Judgment was for B., his title being said to relate to the first delivery. The court said that while marriage might be a valuable consideration, the determining element in this case was the fact that the woman married with knowledge of the conveyance to B. In *Ladd v. Ladd*,<sup>48</sup> where the wife's right to dower also depended upon the question whether A. died seised of the land, the court held that the deed would not relate and that the wife was entitled. This case, however, may rest upon the ground that X. was throughout the depository for A. and not for B.

In *Stone v. Duvall*<sup>49</sup> B., the grantee, died after delivery to X. but during the life of A. A. thereupon filed a bill to have the deed canceled. The court held that this could not be done; that although the deed did not operate to give B. any immediate rights or interest in the premises, nevertheless it was out of A.'s power to affect it, and on his death the delivery to B.'s heir would operate by relation to vest the title in the said heir. The court referred to the fact that the deed purported to be for a consideration.

These cases are too few to justify any very general conclusions. These suggestions may, however, be made: (1) No decision, with the possible exception of *Ladd v. Ladd*, that purports to stand on this doctrine of relation reaches a result different from that which

<sup>45</sup> *Accord*, *Owen v. Williams*, 114 Ind. 179; 15 N. E. 678 (1888), *semble*.

<sup>46</sup> *Straman v. Rectine*, 58 Oh. St. 443, 51 N. E. 44 (1898).

<sup>47</sup> 114 Ind. 258, 16 N. E. 585 (1888).

<sup>48</sup> 14 Vt. 185 (1842).

<sup>49</sup> 77 Ill. 475 (1875).

would have been reached had it proceeded on the more generally accepted and sounder view that title passes by the first delivery; (2) Assuming the doctrine of relation to be applicable to these cases, the application of the doctrine is harmonious with the application of it in the cases of the true escrows: *i. e.*, there is no relation of the title where the situation is such that if B., instead of being the grantee under an escrow, were the holder of an equitable interest in the land, his equity would be cut off by the transactions had between his grantor and the third person contesting B.'s right, and where the situation is such that an equity would not be cut off, the doctrine of relation is applied.

### III.

The characteristic features of the two groups of cases that have been thus far considered have been these: In the first group, the delivery of the escrow by the grantor A. to the depositary X. is not intended by the grantor to pass thereby to the grantee B. any interest in the property, and whether any title ever shall pass depends upon the future conduct of the grantee; in addition, however, to this delivery in escrow, there is some other transaction between A. and B. sufficient *per se* to create in B. an interest in the land that a court of equity would protect. In the second group the state of affairs is just the opposite; there is no transaction between A. and B. sufficient to give an equitable estate in the land, but on the other hand when A. delivers the deed to the depositary his intent that it shall definitely operate in B.'s favor is unqualified; it may be his intent that the operation of it, so far as the giving of a possessory interest is concerned, shall be for a time postponed, but that is the only qualification. There remains for consideration a group of cases, not very numerous, in which appears neither of the affirmative factors above mentioned, *i. e.*, where there is no transaction between A. and B. sufficient to create in B. an equitable interest in the land, and where on the other hand it is not clear that A. by his delivery to X. of the deed in B.'s favor intends to part with all control over the deed and to vest at once in B. an unconditional interest in the land postponed only with respect to the possessory rights until A.'s death.

Thus, suppose that there being no contractual relation of any

sort between A. and B., A. executes a deed in favor of B. and delivers it to X. to be delivered by him to B. if B. does some act, as paying a certain sum. It has been held in such a case that the title passes to B. only upon the doing of the act.<sup>50</sup> On the other hand, at any time prior thereto A. may withdraw the deed;<sup>51</sup> or if, A. being a trustee, the trust is ended, B. cannot later make the deed effective by complying with its terms;<sup>52</sup> or, if A. dies before performance by B., the deed cannot later be made operative.<sup>53</sup> The court said, in this latter case, that the deed under these circumstances was nothing more than an offer, necessarily terminating on A.'s death. *A fortiori* is this result inevitable where, from the very nature of the offer upon which the deed is delivered in escrow, it cannot be performed during A.'s life, as where A. executes a deed to B., his son, and gives it to X. to deliver to B. if the latter shall after A.'s death make provision for certain specified persons.<sup>54</sup> The court here, from the fact that the conditions by their own terms could not be performed, and the instrument thereby become effective until after the grantor's death, said that the instrument was for this reason necessarily testamentary in character.<sup>55</sup> Another case in which the court definitely examined this question is *Campbell v. Thomas*.<sup>56</sup> The Wisconsin Statute of Frauds makes a parol contract for the sale of land void. Under such a contract with B., A. executed a deed in B.'s favor and gave it to X. to be delivered when B. paid the stipulated price. X., on A.'s instructions, refused to deliver the deed to B., and the court held categorically that it was essential to create rights under an escrow that there should be a valid contractual relation between the parties.

On the other hand, there are not lacking cases in which, on somewhat similar states of fact, the courts have held that if the contingency occurred or the requirement was satisfied by B. even after

<sup>50</sup> *Sparrow v. Smith*, 5 Conn. 113 (1823).

<sup>51</sup> *Davis v. Brigham*, 56 Or. 41, 107 Pac. 961 (1910).

<sup>52</sup> *Anderson v. Messenger*, 158 Fed. 250 (1907). Cf. *Anderson v. Realty Co.*, 29 Oh. Cir. Ct. 267 (1906).

<sup>53</sup> *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536 (1908).

<sup>54</sup> *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426 (1886).

<sup>55</sup> This appears to be the definitely established rule in Michigan. *Culy v. Upham*, 135 Mich. 131, 97 N. W. 405 (1903); *Felt v. Felt*, 155 Mich. 237, 118 N. W. 953 (1908).

<sup>56</sup> 42 Wis. 437 (1877).

the death of A., the title would thereupon pass to B. Thus in *Nolan v. Otney*<sup>57</sup> A. executed a deed of land in favor of B. and gave it to X. It was originally intended that his delivery should be absolute, but in fact A. kept control of the deed, although it was in X.'s custody. A day or two before A. died he told X. to deliver the deed to B. if B. should pay a sum of money and execute a note. After A.'s death B. fulfilled these requirements and X. delivered him the deed. In an action between A.'s widow and B. (apparently to determine the title to the land) it was held that B. had the legal title. The court, after animadverting upon the fact that ordinarily the acts to be done by the grantee are contemplated as being performed in the life of the grantor, and pointing out that these requirements might have been complied with in the life of the grantor, said that this fact was of no importance, that there was no more difficulty in applying the doctrine of relation to this class of case than to any other case of delivery in escrow; and that upon the performance by B. of the conditions imposed by A. the title passed to the former as of the date of the original delivery of the instrument.<sup>58</sup> The same principle has been applied in one or two cases where there was no act to be performed by B. which could in any wise be regarded as in the nature of a consideration for the transfer of the title. In *Hunter v. Hunter*<sup>59</sup> A. delivered to X. a deed in favor of B. to be delivered to him if he reached the age of twenty-five. It was held that the death of A. before B. reached twenty-five would not prevent the title passing to him upon the happening of that event, the court saying that there was by the first delivery "a quasi-creation of an estate subject to be defeated by the failure to perform the stipulated condition."<sup>60</sup>

These latter cases seem hard to sustain on any generally accepted principles of law. The difference between these and the other deeds

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<sup>57</sup> 75 Kan. 311, 89 Pac. 690 (1907).

<sup>58</sup> *Accord*, as to a bond, *Graham v. Graham*, 1 Ves. Jr. 272 (1791). In *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300 (1895), and *Hutton v. Cramer*, 10 Ariz. 110, 85 Pac. 483 (1906), the courts used language to the same effect although it was not necessary to the decisions.

<sup>59</sup> 17 Barb. (N. Y.) 25 (1853).

<sup>60</sup> See also *Cook v. Niehaus*, 8 Weekly L. Bull. (Ohio) 259 (1882). In *Prewitt v. Ashford*, 90 Ala. 294, 7 So. 831 (1890), where the grantee was apparently a donee, the court treated the conveyance as being an escrow and creating rights by relation from the time of the first delivery.

made in contemplation of death is marked. In them A. intends unqualifiedly that the title shall go to B. and regards the delivery of the deed to X. as settling matters definitely. Here the very fact that there is the further condition of something being done by B. or of some contingency's occurring, shows that the delivery by A. to X. is not intended by the grantor to be final any more than it is in the case of a true escrow. Of course, if B. performs prior to A.'s death there is no difficulty in sustaining the deed, even though the second delivery is after A.'s death, because the performance by B. would raise an equity in his favor. Where this is not the situation, B. as a volunteer has no equity, nor, as just said, has A. by the delivery to X. intended to vest a title in B. postponing only the possession. If such is the case the complete title to the property must still be in A. and at his death it must go to his heir. Once in A.'s heir, how can A.'s uncompleted deed operate to take the title from him? Merely to say that there is a rule of law that A.'s deed relates is not particularly satisfactory, especially when in the other cases of relation it is possible to find a recognized principle in analogy to which the doctrine of relation is applied.

There is the explanation suggested in *Hunter v. Hunter*,<sup>61</sup> that the deed operates from the first delivery to vest a legal title in B. subject to a condition subsequent. This is open to several objections: it would have to be further modified to embrace the conception of the postponing of possession; it is based upon a construction of the facts that is unjustified, for the very fact that the contingency is uncertain or that B. is to do something further is strong evidence that no more here than in the case of the true escrow is the delivery to the depositary intended to pass at once an estate to the grantee (it is true that the grantor intends by this delivery to give the grantee the right to get an estate, but this will be considered presently); finally, this theory is open to the fundamental objection that it attempts by parol, not to show when the deed is to be delivered, for it is generally accepted that this is not within the Statute of Frauds,<sup>62</sup> but to modify the face of the deed and read into it a condition subsequent that will operate to affect the title to realty.

<sup>61</sup> *Supra*, p. 584.

<sup>62</sup> *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315 (1887); *Dikeman v. Arnold*, 71 Mich. 656, 40 N. W. 42 (1888); *Stanton v. Miller*, 58 N. Y. 192 (1874); *Gaston v. Portland*, 16 Or. 255, 19 Pac. 127 (1888); *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162 (1893).

The following suggestion may be made with respect to these cases, although no decision resting upon this ground has been discovered. The cases like *Davis v. Brigham*<sup>63</sup> are sound enough. They are cases of purely business dealings where the grantor throughout intends to do nothing more, as one of the cases itself says, than to make an offer which he can withdraw at any time prior to acceptance by the grantee. In the cases like *Nolan v. Otney*,<sup>64</sup> on the other hand, this is not the case. While it is true, as said before, that the grantor does not intend by the first delivery to give B. a title, since it is only if B. performs the further requirement that he is to get the deed, it is also true that A. intends to give, and probably considers that by so depositing the deed with X. he has given, B. an irrevocable right to earn the title by doing the required act or to have it come to him if the stipulated contingency happens. It may be, then, that these few cases and the language used by some of the courts in the cases considered in the preceding section indicate a tendency toward a rule that when the deed, perfect on its face and requiring no further act on the part of the grantor, is delivered by him to a depositary with the intent stated above, this is in itself a sufficient part performance by A. of the transfer of the title so that upon these facts alone an indefeasible right is created in B. to be allowed to perform within a reasonable time or to await the coming of the specified contingency, with the result that when the performance is made or the event does happen the title vests, and may be said to "relate." It is well settled that equity will, under certain circumstances, compel a donor to complete an inchoate gift in cases where at law no rights would arise.<sup>65</sup> It may be that here is another kind of uncompleted transaction where law is going one step beyond equity. It may be that the courts in these cases consider the gift by A., if the act required of B. be regarded as the occasion simply of the vesting of the title, or the offer by A., if the act of B. be regarded as the consideration for the transfer of the title, as having advanced to such a stage (since no further act need be required of A. and the document purporting to convey the title is out of his physical control) as to give

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<sup>63</sup> *Supra*, p. 583.

<sup>64</sup> *Supra*, p. 584. This case, however, and *Taft v. Taft*, *supra*, p. 583, are directly *contra*.

<sup>65</sup> The cases are collected in 36 Cyc. 681 *et seq.*

B. something sufficiently like an equitable interest to put him in at least as good a position as the beneficiary in a voluntary declaration of trust. Of course it is obvious that B. is not the beneficiary under a declared trust, nor is he in such a position that for any other reason he could go into equity and compel a transfer of the title. At the same time, there would be nothing inherently unreasonable or unsound if a law court should declare that under facts such as we have been considering B. was entitled to be protected. That the step should be declared to be merely a new application of well-recognized principles, or that it should be taken under the kindly cover of a fiction, would surprise no one who is familiar with the way in which law develops.

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